Supreme Court, U.S.
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No. 99-916

IN THE
Supreme Court of the United States

ENRON POWER MARKETING, INC.,
Petitioner,

v.

NORTHERN STATES POWER CO., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONER'S MEMORANDUM SUGGESTING MOOTNESS AND MOTION TO VACATE

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RULE 29.6 STATEMENT

Enron Corp. incorporates by reference the Rule 29.6 Statement provided in its Petition for Writ of Certiorari filed on November 30, 1999.

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Petitioner Enron Power Marketing, Inc. (Enron) hereby informs the Court that this matter has become moot and respectfully moves the Court for an Order vacating the judgment of the United States Court of Appeals for the Eighth Circuit and remanding to that court with instructions to dismiss the case as moot. *See United States v. Munsingwear Corp.*, 340 U.S. 36 (1950).

Enron filed a Petition for Writ of Certiorari on November 30, 1999, urging the Court to review the decision of the Eighth Circuit in this case. The petition explained that the decision presents important questions concerning the jurisdiction of the Federal Energy Regulatory Commission (FERC) to regulate interstate transmission of electricity. The petition also noted that the decision conflicts in significant respects with decisions of both this Court and the D.C. Circuit.

The petition also stated that respondents Northern States Power Companies (together, NSP) had taken steps to withdraw the tariff filing that gave rise to the present controversy. The petition said that when this withdrawal became effective, this case would be moot, and it said that in such event vacatur of the Eighth Circuit's decision would be appropriate. Pet. for Writ of Cert. at 12-13, 25. By order of December 20, 1999, FERC accepted NSP's unopposed withdrawal of its tariff filing. See Attachment A to this Motion. As a result of this withdrawal, a live controversy ceased to exist with respect to NSP's tariff, and the present case became moot.

The issues raised in Enron's petition, however, warranted this Court's review. NSP initially filed its amendments to its Open Access Tranmission Tariff (OATT) to permit it to favor its retail customers over its wholesale customers in curtailments of transmission. FERC issued an order rejecting NSP's amendments as unduly discriminatory, and NSP petitioned the Eighth Circuit for review, seeking to force FERC to permit its amendments. The Eighth Circuit held that FERC did not have jurisdiction to require nondiscriminatory curtailment of all interstate transmission of electricity and ordered FERC to amend its order "so as not to encroach upon the authority of the regulatory commissions of the states [over NSP's retail transmissions]." *See* Pet. App. 11a. On remand, as di-

rected by the Eighth Circuit, FERC issued an order permitting NSP's amendments, but NSP then took steps to withdraw its proposed curtailment amendments to its OATT. NSP thus erased the specific dispute that led to Enron's petition to this Court, leaving the Eighth Circuit's decision standing.

The Eighth Circuit's decision, holding that FERC lacks jurisdiction over an important part of interstate transmission of electricity, will remain damaging unless it is vacated. Enron, which depends on nondiscriminatory access to the transmission systems of other utilities, would be exposed to assertions of res judicata and collateral estoppel in any future challenge to a renewed discriminatory filing by NSP (which is in no way precluded by the events that have occurred and could not be blocked by FERC, which has been held to lack jurisdiction). Moreover, the decision below would remain the law of the Eighth Circuit, in conflict with the decisions of this and other Courts and in conflict as well with a sound understanding of the role of federal authority in preventing discriminatory practices in the interstate transmission of electricity and promoting competition in the sale of electricity.

In accordance with its normal practice, this Court should vacate the decision of the Eighth Circuit and remand to that court with instructions to dismiss the case as moot. "The established practice of the Court in dealing with a civil case . . . which has become moot while on its way [to the Supreme Court] or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994).

Enron did not in any way cause or contribute to the mootness of this matter. As the Court has noted, the *Munsingwear* rule exists to protect a litigant from the adverse effects of a judgment where it did not have the ability to obtain review because the case became moot through no fault of its own. *See Munsingwear*, 340 U.S. at 40. Vacatur is therefore appropriate under *Munsingwear* when mootness occurred through happenstance, the unilateral actions of the party who prevailed in the lower court, or any circumstances beyond the control of the party seeking vacatur. *See U.S. Bancorp Mortgage Co.*, 513 U.S. at 23-25. NSP's withdrawal of its tariff filing was a unilateral action of the party that prevailed below, and it was entirely beyond the control of Enron. Vacatur is therefore appropriate.[1]

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[1] Enron's right to move for vacatur is unaffected by its status as an intervenor below or by FERC's approval of the withdrawal of the amendments. *See Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392, 1402-03 (11th Cir. 1998) (finding vacatur appropriate on intervenor's motion where intervenor did nothing to cause mootness, which was caused by settlement of other parties, who could not have successfully moved for vacatur on their own); *see also Sackman v. Liggett Group, Inc.*, No. Civ. 93-4166, 1999 WL 627389 at *1-2 (E.D.N.Y. May 21, 1999).

Petitioner therefore respectfully moves the Court for an Order vacating the judgment of the Eighth Circuit and remanding to that court with instructions to dismiss as moot.

Respectfully submitted,

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December 22, 1999

APPENDIX

ATTACHMENT A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

Docket Nos. OA97-25-004
OA97-606-004
ER98-1890-005
ER98-2060-005
EL98-40-004

NORTHERN STATES POWER COMPANY
(Minnesota)

NORTHERN STATES POWER COMPANY
(Wisconsin)

ORDER ACCEPTING WITHDRAWAL OF PROPOSAL

(Issued December 20, 1999)

Nothern States Power Company (Minnesota) and Northern States Power Company (Wisconsin) (collectively *NSP*) filed a letter with the Commission advising that NSP, in response to the Commission's November 15,

1999 Order on Remand in this proceeding,[1] elected to withdraw its proposed amendment to the curtailment procedures in NSP's open access transmission tariff filed in Docket No. ER98-1890-000.[2] No comments were filed to NSP's withdrawal of its curtailment proposal. We hereby accept NSP's withdrawal of its curtailment proposal.

By the Commission.

(SEAL)

/s/ David P. Boergers
DAVID P. BOERGERS
Secretary

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[1] *Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)*, 89 FERC ¶ 61,178 (1999) (Order on Remand).

[2] The Commission previously rejected NSP's proposed tariff sheets containing NSP's revised curtailment procedures. *Northern States Power Co. (Minnesota) and Northern States Power Co. (Wisconsin)*, 83 FERC ¶ 61,098, *clarified*, 83 FERC ¶ 61,338, *reh'g, clarification and stay denied*, 84 FERC ¶ 61,128 (1998). The United States Court of Appeals for the Eighth Circuit, in *Northern States Power Co., et al. v. FERC*, 176 F.3d 1090 (1999), *reh'g denied* (order dated Sept. 1, 1999), remanded this matter to the Commission.